

November 11, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Business Data Services in an Internet Protocol Environment, **WC Docket No. 16-143**;
Special Access for Price Cap Local Exchange Carriers, **WC Docket No. 05-25**;
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local
Exchange Carrier Rates for Interstate Special Access Services, **RM-10593**

Dear Ms. Dortch:

On November 10, 2016, Phillip Berenbroick and Yosef Getachew of Public Knowledge, Michael Calabrese of New America's Open Technology Institute, John Howes of the Computer & Communications Industry Association, and John Windhausen of the Schools, Health & Libraries Broadband Coalition ("Competition Advocates") met with Lisa Hone and Stephanie Weiner of Chairman Wheeler's office and Matthew DelNero of the Wireline Competition Bureau, and discussed issues in the above-captioned proceedings.

The Competition Advocates urged the Federal Communications Commission ("Commission") to proceed quickly to reform the business data service ("BDS") market to promote competition and address unjust and unreasonable prices that enterprise, wholesale, and mobile wireless backhaul customers pay for TDM and packet-based BDS services.

The Competition Advocates support Chairman Wheeler's plan to prevent BDS providers from exercising market power with regards to TDM services.¹ For more than a decade, business customers, community anchor institutions, government agencies, and wireless carriers have paid unreasonably high prices for TDM services. Ultimately, these costs are passed on to consumers in the form of higher prices on goods and services.

While supportive of the Chairman's TDM proposals, the Competition Advocates proposed the Commission adopt a two-year, rather than three year, implementation of the downward adjustment of TDM rates and a larger reduction in rates. Additionally, although Chairman Wheeler's plan proposes a rate reduction of 11%, the record justifies a rate reduction of at least 17% to 20%.² Given the fact that the Commission has been aware of incumbent provider market power and the unreasonable rates, terms, and conditions in the BDS market for

¹ See Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the

² See Declaration of Chris Frentrup and David E.M. Sappington, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 11 (filed Aug. 31, 2016) (supporting a one-time reduction in the price cap index of at least 17.1%); Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25, RM-10593, ¶ 63 (filed Jan. 27, 2016) (finding it would be appropriate to reduce current rates by at least 19.7%).

over a decade, and that incumbent providers have been aware of this proceeding and have had ample time to account for potential changes to the Commission's regulatory approach, a shorter rate adjustment period and a larger rate reduction is merited to allow business customers and consumers to begin to see these cost savings as soon as possible.

Further, earlier this year the Consumer Federation of America ("CFA") estimated that overcharges and abusive pricing in the BDS market totaled approximately \$20 billion per year over the past five years, and have indirectly cost American consumers over \$150 billion since 2010.³ According to CFA, half of the \$40 billion in annual BDS charges are overcharges that are the result of incumbent LEC market power, and those costs are passed through to consumers.⁴ A rate reduction of 17% to 20% is relatively modest in light of the unreasonable monopoly and duopoly prices that incumbent providers have charged for more than a decade.

While the Competition Advocates support (subject to the modifications proposed above) the initial steps the Commission appears poised to take to address unjust and unreasonable rates for TDM services, the Commission should also address the high cost of Ethernet services. The Competition Advocates believe the Commission's Order should address the excessive rates that BDS customers pay for all services over which incumbent providers possess and exercise market power, regardless of the underlying technology.

If the Commission opts not to adopt ex ante price regulation of Ethernet, the Commission should strengthen the guidance for the complaint process when customers face unjust and unreasonably high Ethernet rates. As INCOMPAS has explained, the evidence in the record shows that the largest incumbent LECs use their market power to drive out competitive providers. The Commission should find it is presumptively unreasonable for incumbent LECs to take actions that unjustly raise prices on wholesale customers or have the effect of making it more difficult for wholesale customers to compete and serve retail customers.⁵ Such anti-competitive behavior reduces the likelihood of future facilities-based competition, reduces competition, and harms downstream retail customers and consumers.

Additionally, the Commission should adopt some form of the pricing guidelines BT has proposed for the complaint process. Pricing guidelines could serve as a guidepost by which the Commission could judge whether Ethernet rates are just and reasonable.⁶ Without such a guidepost, purchasers will be uncertain regarding whether they are likely to receive relief from high rates. The Commission is well aware that undertaking a complaint process is very costly, especially for small businesses. Without sufficient guidance regarding how the Commission will judge high rates, purchasers will face great uncertainty regarding their prospects of success. This uncertainty, coupled with the high cost, will reduce the likelihood that purchasers will bring

³ Mark Cooper, Consumer Federation of America, *The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excessive Profits* 1, 33-35 (2016), *available at* <http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-Special-Access.pdf>.

⁴ *Id.* at 1, 5.

⁵ See Notice of *Ex Parte* of INCOMPAS, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 2-3 (filed Nov. 9, 2016).

⁶ See Notice of *Ex Parte* of BT Americas Inc., WC Docket No. 05-25, RM-10593 (filed Nov. 4, 2016).

complaints to the Commission's attention, undermining the utility and effectiveness of the complaint process in addressing unjust and unreasonable Ethernet rates.

The Competition Advocates also explained that if the Commission fails to address Ethernet rates in the BDS reform Order, it should not eliminate the rules it adopted in its 2015 *Technology Transitions Order* ensuring that wholesale BDS inputs remain available at reasonably comparable rates, terms, and conditions for purchasers when incumbent providers seek section 214 authority to discontinue, reduce, or impair their TDM networks.⁷ As the Commission keenly observed in earlier proceedings, without a wholesale access requirement, "we risk allowing the benefits of competition to be lost irrevocably."⁸ The Commission explained then that it was not prepared accept the elimination of wholesale BDS competitors while it sought answers to key questions regarding the BDS market and how it should address the lack of competition.⁹ Because the current BDS reform proposal does not include a plan to adopt and implement rules to ensure purchasers of BDS have access to packet-based services at just and reasonable rates, the Commission's interim rules should remain in place. Without this protection, incumbent BDS providers will be incentivized to discontinue their regulated TDM services and charge exorbitant rates for packet-based services of comparable speeds in order to drive competitive BDS providers out of the marketplace altogether. Given the Commission's intention to publish a subsequent FNPRM on packet-based BDS services, the Commission should continue with its interim rule until it adopts new rules to facilitate competition and ensure just and reasonable rates for both TDM and Ethernet technologies.

The Competition Advocates also urged the Commission to adopt rules that prevent incumbent providers from unreasonably discriminating against competitors by charging higher rates for wholesale access than they charge to retail customers.

Finally, while the Competition Advocates believe that the record clearly demonstrates a lack of competition for all BDS services today, the Commission appears poised to publish an FNPRM to seek additional information on packet-based services. The Competition Advocates urged the Commission to move forward quickly with any such FNPRM, and warned that the Commission should not presume or find, without adequate support in the record, that there is effective competition in any market for packet-based BDS services. Instead, the FNPRM should be premised on the fact that the Commission's failure to regulate Ethernet BDS services in the BDS reform Order (if it does fail to do so) is based solely on so-called administrability concerns for regulating the prices of such packet-based technologies.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

⁷ See *Technology Transitions, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, *Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 30 FCC Rcd 9372, 9433 ¶¶ 131-132 (2015).

⁸ *Id.* at 9450 ¶ 141.

⁹ See *id.* at 9447 ¶ 136.

Respectfully submitted,

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